UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

WYMAN GORDON PENNSYLVANIA, LLC

and

CASES 04-CA-182126
04-CA-186281
04-CA-188990

UNITED STEEL, PAPER AND FORESTRY
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION, AFL-CIO-CLC

CHARGING PARTY'S MOTION TO STRIKE BERLEW'S EXCEPTIONS AND OPPOSITION TO BERLEW'S MOTION TO INTERVENE

William Berlew moves to "renew" his Motion to Intervene in the above-captioned case. (Berlew Mot. to Int. at ¶ 5). The Board, however, has already ruled on Berlew's Motion, finding that the Administrative Law Judge did not abuse his discretion in denying Berlew full intervenor status. Therefore, Berlew's Motion to Intervene is functionally a Motion for Reconsideration and should be addressed as such.

Charging Party United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC ("Union") opposes Berlew's second attempt to intervene because: 1) his Motion is untimely and Berlew cannot identify any extraordinary circumstances in support of his Motion; 2) the Board has already ruled on this matter; 3) the Board only permits post-intervention hearing in rare circumstances, none of which are present here; and 4) Berlew seeks to intervene and reopen the hearing in order to introduce

irrelevant evidence. Because the Board should deny Berlew's Motion, the Union respectfully requests that the Board also strike Berlew's Exceptions.

1. Berlew's Motion is untimely and he offers no extraordinary circumstances or applicable precedent in support of his Motion.

The Board has already ruled on Berlew's previous Motion to Intervene. Without providing any justification, Berlew now asks the Board to overturn its earlier Order. Berlew first moved to intervene before the hearing in this case began. The ALJ issued his Order on March 14, 2018, granting Berlew limited intervention solely for the purpose of filing a post-hearing brief. The next day, Berlew filed an Emergency Request for Special Permission to Appeal from the ALJ's Order. The Board denied Berlew's Request and upheld the ALJ's Order on March 19, 2018. Specifically, the Board ruled: "We find that the judge did not abuse his discretion in denying full intervenor status to Berlew." *Board Order in Wyman Gordon Pennsylvania, LLC,* 04-CA-182126 (2018).

Six months after the Board issued its Order, Berlew moves to intervene again, claiming that he is "renew[ing]" his earlier Motion to Intervene. (Berlew Mot. to Int. at ¶ 5). The Board's Rules and Regulations do not allow a party to "renew" a motion. The Rules and Regulations do provide that "[a] party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order." §102.48(d)(1). Here, Berlew is asking the Board to reconsider its previous Order. Therefore, Berlew's Motion is functionally a motion for reconsideration under the Board's Rules and Regulations and should be addressed as such.

§102.48(d)(2) requires a party moving for reconsideration to file its motion within 28 days after service of the Board's order. The Board issued its Order on March 19, 2018. Berlew

filed his new Motion on September 17, 2018, almost six months later. Berlew's Motion is clearly untimely and must be denied on those grounds alone.

Further, a party may only move for reconsideration "because of extraordinary circumstances." Berlew fails to identify any extraordinary circumstances here. Instead, he rehashes the same arguments that the Board has already considered and rejected. He acknowledges as much in his new Motion: "as Berlew has argued at every turn, Wyman could not and did not represent his interests." (Berlew Br. in Supp. of Mot. to Int. and Excepts. at 6). The Board has already considered this argument and upheld the ALJ's Order finding that the Employer adequately represented Berlew's interests. *See ALJ Order Granting William Berlew Limited Intervention,* 04-CA-182126 (2018).

The Employer adequately represents Berlew's interests in this matter because they both have the exact same objective: to demonstrate that the Employer's withdrawal of recognition was valid. And both Berlew and the Employer raise largely the same arguments in their Exceptions. In fact, parts of Berlew's brief are *identical* to the Respondent's Brief in Support of Exceptions to Administrative Law Judge's Decision. (Berlew Br. in Supp. of Mot. to Int. and Excepts. at 26-30; Resp. Br. in Supp. of Excepts. at 35-39). It appears that Berlew copied sections of the Employer's brief into his own.[1] If so, the Employer is clearly representing Berlew's interests: Berlew is using the Employer's arguments in his own brief. Perhaps the Employer copied these arguments from Berlew's brief, which would also demonstrate that the Employer represents Berlew's interests. In this scenario, both parties are working together and the Employer is adopting Berlew's arguments. Either way, it is clear that Berlew and the Employer are

[1] Berlew refers to the Employer as "Wyman" throughout his brief while the Employer refers to itself as "the Respondent." In several places, Berlew accidentally refers to the Employer as "the Wyman" suggesting that he copied and pasted the Employer's argument and failed to remove "the" when changing "the Respondent" to "Wyman." (Berlew Br. in Supp. of Mot. to Int. and Excepts. at 28).

coordinating with each other, undermining Berlew's contention that the Employer cannot adequately represent his interests.

The ALJ correctly found that the Employer adequately represented Berlew's interests and therefore granted him limited intervention for the sole purpose of filing a post-hearing brief. Berlew never asked the Board to reconsider its Order upholding the ALJ. Berlew cannot sidestep the timing and substantive requirements of § 102.48(d) now by calling his Motion a "renewal." Granting Berlew's Motion would imply that parties could avoid the Board's Rules and Regulations by simply renaming their motions.

Not surprisingly, Berlew's attempt to support his Motion with Board precedent is unavailing. Berlew cites *Veritas Health Serv.*, 363 NLRB No. 108, slip op. (2016) and *Latino Express, Inc.*, 366 NLRB 911 (2014) as support for his argument that "[t]he Board has also ruled on exceptions from putative intervenors without a motion to intervene." (Berlew Mot. to Int. at ¶ 5). In both *Veritas* and *Latino Express*, however, the Board upheld the ALJs' denials of the employees' motions to intervene. And in *Latino Express*, the Board specifically *refused* to consider the intervenor's exceptions "in light of our affirmance below of the judge's denial of the motion to intervene." 366 NLRB 911, 911, n. 1. Finally, Berlew cites *Camay Drilling Co.*, 239 NLRB 997 (1978) for the proposition that "the Board has allowed putative intervenors who were denied intervention before or at the hearing to file motions to intervene once proceedings reach the Board." (Berlew Mot. to Int. at ¶ 5). But in *Camay*, the intervenor never filed for special permission to appeal the ALJ's order denying intervention. The Board considered the intervenor's motion for the first time after the hearing.[2] In contrast, the Board here has already

[2] The Board granted the intervenor's motion to intervene in *Camay* because the trustee intervenor had specific evidence that the Board agreed was relevant. The only specific evidence that Berlew identifies is employee testimony regarding the authenticity of the withdrawal petition. As discussed in more detail in Section 4 of this

ruled on Berlew's Motion and Berlew's opportunity to timely file a motion for reconsideration of the Board's Order has long passed.

2. The Board's previous Order established the law of this case.

Even if Berlew's "renewal" was somehow valid, the Board already ruled that "the judge did not abuse his discretion in denying full intervenor status to Berlew." *Board Order in Wyman Gordon Pennsylvania, LLC*, 04-CA-182126 (2018). As the Board has recognized, "[t]his interim order thus established the law of the law of the case, which governs the future course of the proceedings." *Teamsters Local 75*, 349 NLRB 77, 80 (2007) (internal citations omitted). Under the law-of-the-case doctrine, the Board can only reverse a prior order "under extraordinary circumstances such as where the initial decision was clearly erroneous and would work a manifest injustice." *Id.* at 80 (internal quotations and citations omitted).

Berlew fails to identify any extraordinary circumstances here. Instead he makes the exact same arguments that he presented in his first motion: that he has a substantial interest in this proceeding, that the Employer cannot adequately represent this interest, and that due process requires intervention.[3] The Board has already considered these arguments and upheld the ALJ's Order. The law-of-the-case doctrine prevents the Board from reversing itself simply because Berlew does not like the ALJ's Decision after the hearing.

3. Berlew cannot move to intervene after the hearing has concluded.

Even if the Board had never issued its Order, Berlew's Motion would still be untimely. The Board recently recognized that "[n]o provision is made in the Board's rules for intervention

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Opposition, this evidence is irrelevant. The analysis of the validity of a withdrawal petition turns on the information that the employer had at the time of withdrawal, not on after-the-fact authentications.

[3] The D.C. Circuit recently rejected the same due process arguments. *Veritas Health Services Inc. v. NLRB*, 895 F.3d 69, 88 (D.C. Cir. 2018) (citing *Commc'n Workers of Am. v. Beck*, 487 U.S. 735, 745 (1988); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 613 (1969); *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705-06 (1944); *Chelsea Indus. Inc. v. NLRB*, 285 F.3d 1073, 1077 (D.C. Cir. 2002)).

after the close of a hearing . . .” *The Boeing Co.*, 366 NLRB No. 128 (2018). In the same decision, the Board acknowledged that “in rare instances, the Board has permitted post-hearing intervention” and listed several examples. None of these examples, however are applicable here. The Board recognized that it has permitted post-hearing intervention to a successor employer who faced potential liability, a national union when the respondent made claims about its representation in a hearing with the local union, and a second union claiming to represent employees in a case filed over the first union’s certification petition. In contrast to these examples, Berlew’s situation does not present rare circumstances requiring intervention and he should not be allowed to intervene after the hearing has concluded.

4. Berlew seeks to intervene to introduce irrelevant evidence that would not change the outcome of the hearing.

Berlew’s “renewed” request to intervene is untimely and asks the Board to rethink its earlier Order without providing any justification. In addition, Berlew asks the Board to overturn its decision, post-hearing, and to *reopen* the hearing for one reason: so he can introduce evidence that is irrelevant to analyzing the lawfulness of the Respondent’s withdrawal of recognition. The ALJ found that the withdrawal of recognition was unlawful for a number of reasons, including his finding that the petition did not provide objective evidence that the Union had lost majority support. Berlew only offers evidence regarding the validity of the petition, arguing that he could call additional employee witnesses to authenticate signatures and the petition itself. (Berlew Br. in Supp. of Mot. to Int. and Excepts. at 13-14). But this testimony is completely irrelevant to assessing the validity of the petition. It is well established that the Board only considers evidence that the employer had at the time it withdrew recognition when deciding whether the withdrawal was lawful. *Anderson Lumber Co.*, 360 NLRB 538, 544 (2014); *Seaport Printing & Ad Specialties Inc.*, 344 NLRB 354, 357 & n.8 (2005), *enfd.* 192 Fed. Appx. 290 (5th Cir. 2006);

RTP Co., 334 NLRB 466, 469 (2001), *enfd.* 315 F.3d 951 (8th Cir. 2003). Accordingly, the Board has declined to hear testimony from petition signers about their intentions or understandings when they signed the petition. *Anderson Lumber*, 360 NLRB at 543-544; *Highland Reg'l Med. Ctr.*, 347 NLRB 1404, 1416 n. 17 (2006). This analysis makes sense. Allowing employers to rely on post-withdrawal evidence would lead "to the incongruous result that an employer could withdraw recognition even where the evidence before it does not demonstrate that a union had actually lost majority status, in the hope that it would unearth evidence in time for the unfair labor practice hearing." *Pac. Coast Supply, LLC v. NLRB*, 801 F.3d 321, 333 (D.C. Cir. 2015), *quoting* NLRB brief. Acknowledging this precedent, the ALJ still allowed the Employer to present 6 employee witnesses who testified about their intentions and understandings when signing the petition. (Tr. at 40-43; 165; 771; 780; 789; 803; 821). Berlew now attempts to reopen the record to solicit yet more testimony that would be irrelevant to the lawfulness of the Employer's withdrawal of recognition. Berlew should not be allowed to untimely intervene in order to add irrelevant evidence to the record. *See Board Order in Mi Pueblo Foods*, 2014 WL 4545619, Case 32-CA-064836 (2014) (denying motion for reconsideration and recognizing that §102.48 "requires a party to show that any new evidence it seeks to introduce 'would require a different result'").

5. The Board should strike Berlew's Exceptions.

The Board should deny Berlew's second Motion to Intervene because the Board has already decided this issue, Berlew's Motion is untimely, and Berlew seeks to intervene to add irrelevant evidence to the record. The Board should also strike Berlew's Exceptions. Berlew was granted limited intervenor status to file a post-hearing brief, which he did. The ALJ's Order did not allow Berlew to file exceptions. In his Order, the ALJ grants Berlew's motion "for the

limited purpose of filing a post-trial brief" and cites *Board Order in The Boeing Company,* Case No. 19-CA-32431 (2011). In that order, the Board allowed the intervenor to file a post-hearing brief and specified that "this order grants the limited intervenors no other rights in relation to this proceeding." Similarly, the ALJ and the Board did not grant Berlew any additional rights in this case, such as filing exceptions. Consistent with the ALJ's and the Board's Orders and Board precedent, Berlew should not be allowed to file exceptions. *See Latino Express, Inc.*, 360 NLRB 911, 911 n. 1 (2014) (declining to consider intervenor's exceptions that respondent did not incorporate "in light of our affirmance below of the judge's denial of the motion to intervene").

6. Conclusion

Berlew attempts to intervene in this proceeding again, after the Board already considered and rejected his initial motion to intervene. The Board should deny his second attempt because it has already ruled on this matter. In addition, Berlew untimely filed his new Motion and explains that he seeks to intervene for one reason: to introduce wholly irrelevant evidence into the record. The Board should not allow Berlew to intervene and should also strike his Exceptions, which largely mirror the Respondent's Exceptions.

Respectfully submitted,

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